

D.P.U. 88-265-A

Request for review pursuant to G.L. c. 164, § 56D of power purchase contracts between Newbay Corporation as seller and Braintree Electric Light Department, Groton Electric Light Department, Hingham Municipal Lighting Plant, Holden Municipal Light Department, Littleton Electric Light Department, Middleborough Gas and Electric Department, Middleton Municipal Light Department, North Attleboro Electric Department, Princeton Municipal Light Department, Shrewsbury Electric Light Plant, and Taunton Municipal Lighting Plant, respectively, as buyers.

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**ORDER ON JOINT MOTION FOR APPROVAL OF OFFER OF SETTLEMENT  
AND TERMINATION OF PROCEEDINGS**

I. INTRODUCTION

On March 18, 1994, eleven municipal light departments ("Municipals") along with Newbay Corporation ("Newbay") and the Blackstone Park Improvement Association ("BPIA") submitted to the Department of Public Utilities ("Department") an Offer of Settlement and Termination of Proceedings ("Offer of Settlement"), a Joint Motion for Approval of Offer of Settlement and Termination of Proceedings ("Joint Motion"), and a Joint Statement in Support of Joint Motion for Approval of Offer of Settlement and Termination of Proceedings ("Joint Statement"). The proposed settlement is intended to resolve all issues arising between the Municipals and Newbay under power sales agreements executed between the Municipals and Newbay in 1987 ("1987 agreements") and filed with the Department on February 16, 1988.

Acceptance of the Offer of Settlement would result, by its terms, in withdrawal of the 1987 agreements and termination of D.P.U. 88-265. The Joint Motion contains a deadline of

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<sup>1</sup> The eleven municipal light departments are: Braintree Electric Light Department, Groton Electric Light Department, Hingham Municipal Lighting Plant, Holden Municipal Light Department, Littleton Electric Light Department, Middleborough Gas and Electric Department, Middleton Municipal Light Department, North Attleboro Electric Department, Princeton Municipal Light Department, Shrewsbury Electric Light Plant, and Taunton Municipal Lighting Plant.

<sup>2</sup> Newbay has since executed agreements with each of the Municipals assigning the 1987 agreements to Rhode Island Cogeneration Associates ("RICA"). The term "Newbay" is used in this Order in reference to both RICA and Newbay Corporation, unless otherwise noted.

May 2, 1994 for a Department decision on the Offer of Settlement.<sup>3</sup>

## II. PROCEDURAL HISTORY

On February 16, 1988, the Municipals filed the 1987 agreements with the Department for review under G.L. c. 164, § 56D, which provides in pertinent part:

. . . This section shall not apply to contracts for the supply of electricity to a municipal plant except that such contract shall be subject to the approval of the department of public utilities. Said department may, upon its own initiative, where such contract is for a period longer than three years, after notice and a public hearing, make such order relative to the rates, prices and charges covered by such contract as it deems the public interest requires.

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<sup>3</sup> On April 29, 1994, the Department marked for identification the following documents: the 1987 agreements (Exhs. DPU-1 through 11); the Municipals' responses to the Department's first, second, and third sets of information requests (Exhs. DPU-12 through DPU-25); March 18, 1994 Offer of Settlement (Exh. DPU-26); March 18, 1994 Joint Statement in Support of Joint Motion for Approval of Offer of Settlement and Termination of Proceedings (Exh. DPU-27); March 18, 1994 Economic Analysis (Exh. DPU-28); Exh. DPU-29, Braintree Electric Light Department, NEP agreement; Exh. DPU-30 Groton Electric Light Department, NEP agreement; Exh. DPU-31 Hingham Municipal Lighting Plant, NEP agreement; Exh. DPU-32 Holden Municipal Light Department, NEP agreement; Exh. DPU-33 Littleton Electric Light Department, NEP agreement; Exh. DPU-34 Middleborough Gas and Electric Department, Buyout agreement; Exh. DPU-35 Middleton Municipal Light Department, NEP agreement; Exh. DPU-36 North Attleboro Electric Department, NEP agreement; Exh. DPU-37 Princeton Municipal Light Department, Buyout agreement; Exh. DPU-38 Shrewsbury Electric Light Plant, First Amendment to NEP agreement; and Exh. DPU-39 Taunton Municipal Lighting Plant, NEP agreement. Exhibits DPU-1 through DPU-11 include amendments to the agreements. Exhibits DPU-22 and DPU-29 through DPU-39 include attachments.

None of the parties objected to the Department's marking of the documents as exhibits. Accordingly, the Department hereby moves into evidence the above marked exhibits.

The Department docketed these matters as D.P.U. 88-265.

The 1987 agreements between the Municipals and Newbay provided that Newbay would build an approximately 72 megawatt ("MW") coal-fired cogeneration facility in East Providence, Rhode Island, and that the Municipals would purchase approximately 32 MW of the project's capacity<sup>4</sup>. The New England Power Company ("NEP") contracted for the remaining capacity of the proposed project (Exh. DPU-27 at 2).

On November 22, 1991, the following petitions to intervene were filed: the BPIA, the Conservation Law Foundation ("CLF"), the City of Providence, Rhode Island, and the Warwick Land Company ("WLC"). On March 18, 1993, Newbay filed a petition to intervene. On May 25, 1993, the Massachusetts Public Interest Research Group ("MASSPIRG") and the Rhode Island Attorney General filed petitions to intervene. On May 26, 1993, the Massachusetts Attorney General filed a notice of intervention.

As a threshold matter to consideration of the contracts, the hearing officer solicited comments and briefs on the standard of review to be applied under G.L. c. 164, § 56D, and granted limited participant status to those who filed petitions to intervene on or before May 26, 1993 for the sole purpose of soliciting comments on the standard of review (April 16, 1993

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<sup>4</sup> The Municipals contracted for the following amounts of power (in kilowatts) under the 1987 agreements: Braintree-6000; Groton-500; Hingham-2000; Holden-2000; Littleton-3000; Middleborough-2000; Middleton-500; North Attleboro-4000; Princeton-300; Shrewsbury-2000; Taunton-10,000.

Hearing Officer Ruling and Request for Comments/Briefing<sup>5</sup>). In addition, since the Municipals filed the 1987 agreements with the Department, Newbay has been involved in several regulatory and court proceedings in Rhode Island. The hearing officer deferred ruling on the petitions to intervene and reviewing the 1987 agreements pending the Department's determination of the standard of review under G.L. c. 164, § 56D and resolution of the Rhode Island proceedings (June 2, 1993 Public Hearing Tr. at 6).

On March 18, 1994, the Municipals, Newbay, and the BPIA submitted the Offer of Settlement and Joint Motion to the Department.<sup>6</sup> Following receipt of the Offer of Settlement, the hearing officer allowed all of the petitions to intervene on April 25, 1994. The Department is issuing an Order on the Standard of Review today.

Newbay contends that the only pending Rhode Island regulatory proceeding is before the Rhode Island Coastal Resources Management Council ("CRMC") See, e.g., Exh. DPU-29, Braintree Electric Light Department/RICA Agreement at 3-4).

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<sup>5</sup> The Massachusetts Attorney General, CLF, Newbay, the Municipals, the Massachusetts Executive Office of Environmental Affairs, and the Rhode Island Attorney General submitted briefs/comments on the standard of review under G.L. c. 164, § 56D.

<sup>6</sup> On March 18, 1994, the settlement package was provided to all of the parties to the proceeding. On March 21, 1994, the WLC submitted an objection to the Offer of Settlement but provided no explanation of its bases for objecting. On March 25, 1994, the Rhode Island Attorney General notified the Department by letter that he did not intend to oppose the Offer of Settlement. The remaining parties neither supported nor opposed the Offer of Settlement.

Newbay is challenging actions by the CRMC in Rhode Island Superior Court and has obtained a stay of that proceeding until May 27, 1994, to allow for negotiation of a settlement Newbay Corporation v. Coastal Resources Management Council No. 92-450 (R.I. Sup. Ct. February 21, 1994 Order Granting Motion to Stay)). Newbay contends that the Newbay facility requires only Department approval of the 1987 agreements to be financeable, and CRMC approval to begin construction See, e.g., Exh. DPU-29, Braintree Electric Light Department/RICA Agreement at 3-4).

### III. THE PROPOSED SETTLEMENT

The Offer of Settlement consists of power purchase agreements between NEP and nine of the Municipals ("NEP/Municipal agreements") and direct payments by two of the Municipals in consideration of cancellation of the Newbay project.

The Offer of Settlement provides that Department approval will encompass approval of the NEP/Municipal agreements and, to the extent the Department deems necessary, approval of the direct buyouts (Exh. DPU-26 at 2-3). The Offer of Settlement further stipulates that, upon its approval by the Department, the

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<sup>7</sup> In a separate agreement between NEP and Newbay, which is not before the Department for its approval, NEP has agreed to buy out its capacity entitlement in the Newbay project at \$303.45 per kilowatt ("KW") for a total of approximately \$12,138,000 (Exh. DPU-27 at 3). In addition, NEP agreed to pay the same per KW amount to buy out the 1987 agreements of any Municipals that opted to enter into power purchase agreements with NEP id.). The NEP/Newbay agreement further provides that Newbay will release those municipals from their 1987 agreements who, rather than contracting with NEP for alternative power, directly pay Newbay the same per KW amount paid by NEP id.).

Municipals' request for approval of the 1987 agreements will be deemed withdrawn with prejudice and the Department's investigation terminated id. at 3). The Offer of Settlement states that in addition to Department approval of the NEP/Municipal agreements, there is one remaining condition precedent to effectiveness of the settlement -- acceptance by the Federal Energy Regulatory Commission ("FERC") of the NEP/Municipal agreements id. at 2).<sup>8</sup>

The Municipals entering agreements with NEP chose one of two types of arrangements: a system power agreement or a unit power agreement. The following Municipals entered system power agreements: Braintree Electric Light Department, Littleton Electric Light Department, and Taunton Municipal Lighting Plant (Exh. DPU-27 at 4). Under the system power sales agreements, these Municipals will purchase system unreserved capacity for ten years with the option to extend the term to 20 years id. at 4-5). In addition, Shrewsbury Electric Light Plant has amended an existing system power purchase agreement with NEP id. at 5).

The following Municipals have entered unit power contracts: Groton Electric Light Department, Hingham Municipal Lighting Plant, Holden Municipal Light Department, Middleton Municipal Light Department, and North Attleboro Electric Department id. at

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<sup>8</sup> As wholesale agreements for the purchase of power, the NEP/Municipal agreements are subject to FERC acceptance under Section 205 of the Federal Power Act. NEP filed its agreements with the Municipals with the FERC on February 23, 1994. As of the date of this Order, the FERC had not made a determination in this matter.

6). Under the unit power contracts, these five municipals will have long-term entitlements in the NEP Manchester Street Repowering project and a capacity entitlement in NEP's Bear Swamp pumped hydro project (id.).

In support of Department approval, the signatories to the Offer of Settlement argue that the settlement is reasonable and in the public interest, because by operation of the settlement, the parties can avoid expensive and time-consuming proceedings (id. at 1-2). In addition, the signatories contend that under the Offer of Settlement, the Municipals will experience substantially lower long-term power supply costs(id.).

Specifically, the Municipals contend that the NEP/Municipal agreements are tens of millions of dollars more economic than the 1987 agreements, saving the Municipals \$30 million in relationship to their existing supply plans and \$60 million in relationship to the 1987 agreements (Exhs. DPU-22; DPU-23; DPU-25). The Municipals state that the NEP/Municipal agreements are for power at current market-based rates with prices more favorable than those of the 1987 agreements (Exhs. DPU-27 at 2; DPU-25).<sup>9</sup>

The Municipals assert that they weighed their good faith obligations under the 1987 agreements and assessed Newbay's due

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<sup>9</sup> For example, the Municipals state that the system power sales agreement compares favorably with a recent purchase by Littleton Electric Light Department from Northeast Utilities and with the results of a recent request for proposals ("RFP") conducted by Shrewsbury Electric Light Plant (Joint Motion at 4).

diligence and ability to meet the construction milestone in the 1987 agreements in deciding to enter into negotiations to terminate the 1987 agreements (Exh. DPU-22)<sup>10</sup>. The Municipals cite Newbay's success in numerous court and agency proceedings in Rhode Island to support their contention that Newbay would prevail in the remaining court proceeding involving the CRMC (id. & Attachment 1; Exh. DPU-24)<sup>11</sup>. The Municipals assert that it would not have been in their ratepayers' interests to fail to enter into the settlement agreement (Exh. DPU-22).

With respect to the direct buyout arrangements entered into by Princeton Municipal Light Department ("Princeton") and Middleborough Gas and Electric Department ("Middleborough"), Princeton and Middleborough do not believe their termination agreements with Newbay require Department approval (Exh. DPU-27 at 4 n.1).

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<sup>10</sup> The 1987 agreements contained a December 31, 1993 construction milestone, which if not met, gave the Municipals and NEP the option of cancelling the agreements (See, e.g., Exh. DPU-1 at 7-8). In exchange for the stay of the Rhode Island court proceeding concerning the CRMC, an agreement between the Municipals and RICA extends the milestone (See, e.g., Exh. DPU-29, Braintree Electric Light Department/RICA Agreement at 3). The extension is for 180 days plus the number of days that elapse between November 3, 1993 and the earlier of November 1, 1994 or the date on which the Municipals and RICA agree that the conditions precedent to the Municipal/RICA agreement cannot be satisfied (id.).

<sup>11</sup> The Municipals state that the Newbay project developer has expended \$16 million in actual development costs (Exh. DPU-24).

IV. ANALYSIS AND FINDINGS

In assessing the reasonableness of an offer of settlement, the Department reviews the entire record as presented in the filing and the record in the case to ensure that the settlement is consistent with the public interest. Massachusetts Electric Company, D.P.U. 92-217-A, at 4 (1993), citing Massachusetts Electric Company, D.P.U. 92-217, at 7 (1993); Boston Edison Company, D.P.U. 91-233, at 5 (1992); Western Massachusetts Electric Company, D.P.U. 92-13, at 7 (1992); Massachusetts Electric Company, D.P.U. 91-205, at 4 (1991); see also Tenaska Mass, Inc., D.P.U. 91-200, at 5 (1993). Since the NEP/Municipal agreements are before the Department in the context of a settlement, we will apply this standard of review<sup>12</sup>. The Department has evaluated the Offer of Settlement in light of the 1987 agreements and responses to information requests in this proceeding.

Based on the information provided, the Municipals have demonstrated that the NEP/Municipal agreements are competitively priced and based on current market conditions. It appears that the ultimate price to ratepayers under the NEP/Municipal agreements would be significantly lower than the price that would

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<sup>12</sup> We note that as contracts for the supply of electricity, the NEP/Municipal agreements require Department under G.L. c. 164, § 56D, although as wholesale arrangements, the FERC will determine the rate through its review. However, the direct buyout arrangements proposed by Princeton and Middleborough are not contracts for the supply of electricity, and as such, Department approval is not required under G.L. c. 164, § 56D.

be paid under the 1987 agreements. The Department finds that it is in the public interest to approve an arrangement which will save municipal ratepayers millions of dollars.

Upon consideration of the record in this case, the Department finds that the Offer of Settlement is reasonable and consistent with the public interest. Accordingly, the Department hereby grants the Joint Motion. Our acceptance of the settlement is based on the particular facts presented in this proceeding. In accordance with the terms of the Offer of Settlement, our acceptance of the Offer of Settlement establishes no precedent for future proceedings, whether ultimately settled or adjudicated, and does not constitute a determination as to the merits of any issue in any subsequent proceeding. In particular, the Department's acceptance of the Offer of Settlement in no way reflects a conclusion by the Department as to the reasonableness of NEP's buyout of its own Newbay agreement. The Department reserves its right to intervene in a future wholesale rate proceeding to explore the reasonableness of NEP's buyout and any implications it may have for ratepayers of the Massachusetts Electric Company.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Joint Motion for Approval and Termination of Proceedings, filed by Braintree Electric Light Department, Groton Electric Light Department, Hingham Municipal Lighting Plant, Holden Municipal Light Department, Littleton Electric Light Department, Middleborough Gas and Electric Department, Middleton Municipal Light Department, North Attleboro Electric Department, Princeton Municipal Light Department, Shrewsbury Electric Light Plant, Taunton Municipal Lighting Plant, Newbay Corporation, and the Blackstone Park Improvement Association, be and hereby is granted.

By Order of the Department,

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Kenneth Gordon, Chairman

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Barbara Kates-Garnick, Commissioner

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Mary Clark Webster, Commissioner